



Gateway Reference Number: 12871

5 November 2009

Dear Colleague

Call for Evidence - Review of Restrictions on Private Patient Income: the NHS Foundation Trust Private Patient Income Cap

The Department is today launching a call for evidence, to inform a review of the 'private patient income cap' for NHS Foundation Trusts.

The private patient cap was introduced by the Health and Social Care Act 2003 (which established NHS Foundation Trusts) and limits the income NHS Foundation Trusts can earn from private patient activity¹. The Government is committed to ensuring that NHS Foundation Trusts keep prioritising NHS patients and that the private income FTs earn is used to benefit the NHS. At the same time, we recognise some of the concerns about how the current cap operates in practice. In particular, we are aware of concerns that the cap does not operate evenly, and could over time preclude an increasing number of NHS Foundation Trusts from earning additional private income to deliver a better standard of service to NHS patients

This call for evidence sets out the principles on which the Government believes any reform of the cap should be based and the questions on which we invite your views. Following receipt of evidence, the Department will undergo a policy review process, to complete in the spring. This will be followed by a public consultation on any proposals for reform.

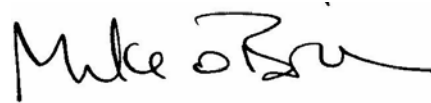
I have enclosed a copy of the call for evidence document with this letter, which I am sending to the Chief Executives of all NHS organisations in England and key stakeholders with an interest in this area. I invite you to submit evidence to us.

I would be grateful if you could send any submissions to the Department by the closing date of Thursday 31 December 2009 - details are set out in the

¹ The provisions are in section 44(2) of the National Health Service Act 2006 (c. 41).

enclosed call for evidence document. I look forward to hearing from you and thank you in advance for your input into this important work.

Kind regards

A handwritten signature in black ink that reads "Mike O'Brien". The signature is written in a cursive style with a large, stylized 'M' and 'O'.

Mike O'Brien QC MP
Minister of State for Health

Call for Evidence

*Restrictions on private patient income: the NHS
Foundation Trust Private Patient Income Cap*

Introduction

1. On 12 May 2009, Baroness Thornton, Government Spokesperson for Health, announced at third reading of the current Health Bill in the House of Lords that the Government would review its policy on the NHS foundation trust private patient income cap. On 12 October, Mike O'Brien QC MP, Minister of State for Health, confirmed during the Commons Report Stage of the Bill that the Government would begin the review with a call for evidence to the NHS and other key stakeholders.
2. The Department is undertaking a considered process to review the private patient income cap. The review will comprise a call for evidence and a review of the current policy, leading to a public consultation with all those who are affected and who have a direct interest in the policy on options for the best, most appropriate way to reform the cap.
3. Alongside this review, the Minister has introduced an amendment to the Health Bill to provide a new minimum cap of 1.5% for mental health NHS foundation trusts. All mental health NHS foundation trusts have, for historical reasons, caps of 0%. Debates in Parliament in the course of the Health Bill, as well as representations from stakeholders, have highlighted the particular difficulties this creates for this class of NHS foundation trust. The amendment, if agreed by Parliament, would provide an interim solution to address the anomaly of the cap for mental health NHS foundation trusts, pending the outcome of this broader review.
4. The private patient cap limits (as a percentage of total income) the level of income which NHS foundation trusts can derive from private charges. It means that an NHS foundation

trust cannot expand the percentage of its total income derived from private charges beyond what it was in the financial year ending 31 March 2003 (“base financial year”). The governing legislation is set out in section 44 of the *National Health Service Act 2006*. The private patient income cap was established to ensure that NHS foundation trusts focus their efforts primarily on the needs of NHS service users.

5. Although NHS Trusts are not subject to a private patient income cap, they are subject to controls and legislative safeguards to control the nature and quantity of private work that they undertake.

6. The legislation governing the private patient income cap is subject to judicial proceedings. This review is not intended to affect those proceedings, which relate to the interpretation of the existing legislation and in particular what income counts towards the cap. The Department’s purpose in conducting the review is to gather intelligence from its stakeholders in the NHS and other key interested parties about the practical effect on NHS foundation trusts of the current law and to seek views on alternative approaches for the future, to ensure that private patient income to the NHS is achieving maximum benefit for NHS patients, whilst avoiding any potentially detrimental effects on NHS services.

A Case for Change

7. The intention of the private patient income cap, when agreed by Parliament, was to manage a potential risk that freedom from Ministerial powers of direction could give NHS foundation trusts an incentive to expand their private patient activity to the detriment of their principle purpose to provide NHS goods and services.

8. In recent years, the Government has been urged to change the rules governing the private patient income cap. Some stakeholders believe that the current rules are too restrictive. There is concern that the cap is preventing NHS foundation trusts from developing new services that could deliver better care for patients. A further argument for reform is that the cap does not allow for an even playing field between NHS foundation trusts, or between NHS foundation trusts and NHS trusts. NHS foundation trusts have caps that currently range from 0% to 30%, whilst NHS trusts do not have a set limit on income that can be derived from private patient activity. This disparity could preclude an increasing number of NHS foundation trusts from earning additional private income to deliver a better standard of service to NHS patients.

Principles

9. The Government believes that the starting position for any reform of the private patient income cap is that it must not change the fundamental public service nature of NHS foundation trusts and should reinforce the following first principles. NHS foundation trusts;
- i. must above all prioritise and protect the interests of NHS patients;
 - ii. must ensure income from private patient work is used for the overall benefit of the NHS;
 - iii. must preserve and promote the principles and values of the NHS (as now enshrined in the NHS Constitution), and achieve national standards and Government policy objectives;
 - iv. must not undertake private patient work in such a way as to result in a detriment to services for NHS patients;

- v. must ensure mechanisms are put in place to secure and demonstrate that there is no cross-subsidy of private care with public money.

Review

10. This call for evidence is to gather information to enable the Government to review its policy on the private patient cap. In reviewing the current policy, we anticipate we may want to consider whether there can be an alternative approach to the private patient income cap which seeks to:

- i. ensure proper control of private patient income within the NHS;
- ii. ensure fairness amongst and between NHS providers;
- iii. reflect the need for service provision to evolve in response to changing patterns of service delivery;
- iv. ensure transparency, showing how money from private patient work would be and is spent on NHS patients;
- v. not undermine NHS foundation trusts' plans to promote innovation, enterprise, partnership working with the private and other sectors etc.

11. The aim of reviewing the current policy is to consider solutions that would promote the better functioning of NHS foundation trusts, better care for NHS patients and better value for the taxpayer. Any emerging solutions will then be subject to public consultation.

Call for Evidence

12. This call for evidence seeks your views on this fundamental review of the private patient income cap. It is not a public consultation but the first stage of the review process and your opportunity to shape the focus and outcome of that process.
13. The Department seeks evidence (to include data and case studies where appropriate) and suggestions from NHS organisations and other stakeholders with an interest in reforming the current rules.
14. The topics we would like you to comment on are listed below. The list is not exhaustive, and the Department would be interested to hear about any other issues that you feel are relevant to its review. As part of the review, the Department is asking for written submissions on the following questions:

Current restriction

- i. Do you consider that the current restriction provides the necessary protection for NHS services and is fit for purpose? Where does it succeed and what are its limitations? Please provide evidence.

Alternative approach

- ii. Do you believe an alternative approach to the private patient income cap should seek to achieve parity between NHS providers or do the differences between NHS Trusts and NHS foundation trusts require different rules and aims?

- iii. How can the current restriction be reformed, strengthened and improved, in a way which takes account of the principles listed under paragraphs 9 and 10?

Submission

15. The call for evidence invites submissions until **Thursday 31 December 2009**.
16. The Department would be happy to receive submissions either as electronic copies (preferred format) to [**Ftevidence@dh.gsi.gov.uk**](mailto:Ftevidence@dh.gsi.gov.uk) or by post to: Call for Evidence Administration Officer, NHS Foundation Trust Unit, Department of Health, Room 4N06, Department of Health, Quarry House, Leeds LS2 7UE.
17. Please ensure that you include relevant contact details. Feedback should be submitted to the Department on a corporate basis and should be attributed and dated, with a note of your name and position. Please also confirm that your feedback is genuine and you have a right to submit it. If you would like to submit your feedback but are unable to meet the deadline, or if you have any questions please contact us at the addresses above.

Confidentiality

18. A list of organisations who submit views and their submissions may need to be published at some point during the review process. If you do not consent to this, you must clearly request that your response be treated confidentially.